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ABSTRACT

The 2 documents that form the body of this ACE Special Report were prepared in response to a large number of inquiries from the Council's members. The first summarizes the Presidential orders, the law, and pending legislation with respect to sex discrimination in higher education. The second describes a typical compliance review and deals with issues that have arisen as institutions have sought to comply with the legal requirements and to prepare affirmative action plans for the employment of women. (HS)

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Sex Discrimination and Contract Compliance

BEYOND THE LEGAL REQUIREMENTS

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The two documents that form the body of this ACE Special Report were prepared in response to a large number of inquiries from the Council's members. The first, by Betty Pryor, Council staff associate, summarizes the Presidential orders, the law, and pending legislation with respect to sex discrimination in higher education. The second, by Sheldon Elliot Steinbach, Council staff associate, and Bernice Sandler, executive associate, Association of American Colleges, describes a typical compliance review and deals with issues that have arisen as institutions have sought to comply with the legal requirements and to prepare affirmative action plans for the employment of women.

THE GOALS of equal opportunity and nondiscrimination as expressed in the nation's laws and Presidential orders are obvious and unexceptionable for institutions of higher education. Our latest information is that the responsible authorities in the U.S. Department of Health, Education, and Welfare will soon issue guidelines for affirmative action programs. It is hoped that there will also be a clarification of procedural rules to guide the interaction between institutions of higher education and the Federal Government on issues of discrimination. The absence of guidelines and procedures has handicapped the effort to achieve these goals. More important, the resulting hesitation has given the unfortunate and, I think, incorrect impression that edu-

cational institutions are resisting efforts to eliminate discrimination. Institutions can and should remove this impression through aggressive action.

Colleges and universities alone cannot change the attitudes that undergird present practices throughout society which prevent women from qualifying for and attaining roles traditionally reserved for men. Nevertheless, they can decide to lead by modifying their own discriminatory practices wherever they exist.

Such modifications, it will soon be discovered, go well beyond those specifically required under the affirmative action plans called for by Presidential orders (discussed below). I believe that if an institution has determined to encourage and reward its women students, faculty, and nonacademic staff as enthusiastically as it encourages and rewards its men, it will have no need to worry about contract compliance and the acceptance of affirmative action plans.

What can a college or university do?

Because of the diversity among institutions, there are no prescriptions that will remove all impediments. Nonetheless, some—although not enough—colleges and universities have begun to reduce barriers to women by taking such steps as:

- Removing in coeducational institutions of different bases for the admission of women and men students, for example, quotas, cutoff levels on test scores,

limited dormitory accommodations for women, conventions about what is "man's work."

- Revising advisory services that deal with the concerns of men but not with the problems encountered by women.
- Giving attention to the special needs of mature women seeking to return to college. Flexible admissions requirements and timing patterns for study and credit for work experience will encourage such women to use their talents.
- Modifying the curriculum to include subjects of special concern to women and to improve the understanding of the roles of women in our society.
- Equalizing, among both faculty and staff, the status of and rewards to men and women who have the same qualifications and perform the same duties.
- Adopting of positive steps to ensure that those involved in the employment of faculty and staff seek women candidates and consider them along with men candidates, applying the same qualification requirements to both.
- Encouraging of women whose preparation for academic positions was interrupted to return and complete their training.
- Nominating women staff members for internships and other extrainstitutional opportunities to qualify them for positions of greater responsibility.
- Cooperating with national organizations that are preparing rosters of professional women qualified for academic and advisory positions, and using these rosters (as they become available) in filling institutional vacancies.
- Actively pursuing and using government funds for

training women professionals and, where possible, recommending changes in government funding patterns in order to give women the same advantages as men (for example, scholarship and fellowship funds for part-time students).

- Finding ways to protect the institution against the presumed evils of favoritism without perpetuating antinepotism regulations that almost invariably discriminate against the professional wife.
- Providing part-time employment for professional women and applying reward, fringe benefit, and tenure policies equitable with those of full-time faculty.
- Providing maternity leave without loss of employment rights.
- Providing child-care facilities for women students and staff.

The new issue of women in education comes at a time when institutions are hard pressed financially and resource allocation problems are acute. I realize that even the proposals I have outlined would carry additional costs. I realize further that efforts to remove the inequities for women cannot diminish or obscure the efforts to adapt more effectively to the needs of ethnic minorities. Nevertheless, these tasks are inescapable and must be grasped just as we have grasped all the others. In their successful execution, as in our efforts with ethnic minorities, our institutions and our personal lives will be enriched and made more effective. There are enormous potentials of strength and performance in the women of the nation. Creating the conditions under which these potentials are likely to be realized is a necessary, honorable, and rewarding assignment.

LAWS AND REGULATIONS ON SEX DISCRIMINATION

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As of this writing, four Federal laws and an executive order affect discrimination against women in colleges and universities. Thus far, the executive order has the widest application of the measures now in effect. It will be discussed in detail later in this report. The latest law relating to sex discrimination was passed by Congress this year and signed by the President on March 24. In

addition, a proposed constitutional amendment that would guarantee equal legal rights to women was recently approved by the Congress and is now awaiting ratification by the required number of states. Pending in the Congress, in varying stages of the legislative process, are three bills concerning sex discrimination.

EXISTING LAWS

The first sex discrimination law enacted is the Equal Pay Act of 1963, which requires equal pay for equal work, regardless of sex. It is enforced by the Wage and Hour Division of the Department of Labor in the same manner as other provisions of the Fair Labor Standards Act, of which it is a part. Exempted from the Equal Pay Act (and other provisions of the Fair Labor Standards Act) are bona fide executive, administrative, and professional employees. Thus the equal pay provisions do not at this time cover faculty members and professional staffs, but do apply to other college employees such as clerks, food service and maintenance workers, and the like. (Two of the bills pending in Congress would apply the equal pay requirement to executive, professional, and administrative staffs [see discussion below of pending legislation].)

Two laws enacted late in 1971 to aid medical, nursing, and other health schools contain provisions barring sex discrimination in the admissions policies of schools receiving Federal support. The prohibition in the Comprehensive Health Manpower Training Act (Public Law 92-157) is stated as follows:

The Secretary [of Health, Education, and Welfare] may not make a grant, loan guarantee, or interest subsidy payment under this title to, or for the benefit of, any school of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, or public health or any training center for allied health personnel unless the application for the grant, loan guarantee, or interest subsidy payment contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex in the admission of individuals to its training programs. The Secretary may not enter into a contract under this title with any such school or training center unless the school or training center furnishes assurances satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs.

An identical prohibition (except for substituting school of nursing for the other enumerated schools) is contained in the Nurse Training Act of 1971 (Public Law 92-158).

The Office for Civil Rights in the Department of Health, Education, and Welfare is responsible for administering these two laws. This same office administers the executive order banning sex discrimination by Federal contractors.

The most recent law (Public Law 92-261, signed March 24, 1972) gives new enforcement powers to the Equal Employment Opportunity Commission (EEOC), which was created by the Civil Rights Act of 1964. Title VII of the 1964 act made it illegal for an employer, labor union, or employment agency to discriminate against employees or applicants because of their race, color, religion, sex, or national origin. The ban prohibits

discrimination, not only in hiring, but in "compensation, terms, conditions, or privileges of employment."

The 1964 act specifically exempted the educational activities of educational institutions from this ban on job discrimination. The new law removes that exemption, thus making the ban applicable to discrimination against school and college teachers because of race, color, religion, sex, or national origin. However, the employment by a religious association or educational institution of persons of a particular religion would not be deemed discriminatory.

The new law also extends coverage of the job discrimination ban to employees of state and local governments. Its new enforcement provisions authorize the EEOC (or the Attorney General in cases involving discrimination against state and local government employees) to bring suit in United States district courts against employers it found to be violating the job discrimination ban. The suits could be filed only if the EEOC were unable to obtain an acceptable conciliation agreement from the employer. If the court held that an employer intentionally engaged in an unlawful discriminatory practice, it could order "such affirmative action as may be appropriate," including the award of two years' back pay.

Under the new law, charges of discrimination may be filed by or on behalf of a person claiming to be aggrieved or by the EEOC itself. The charges must be sworn and in writing, and a notice of such charges must be furnished to the employers within 10 days after they are filed.

CONSTITUTIONAL AMENDMENT

On March 22, 1972, the Senate completed congressional action on an equal rights amendment to the Constitution which has been sought by women's groups for decades. This amendment states:

Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.

To become effective this amendment must be ratified by 38 states. As of this writing, six states have done so.

PENDING BILLS

As far as colleges and universities are concerned, the omnibus higher education bill (S 659) contains the most important provisions in all legislation relating to sex discrimination. Differing versions of this bill have been passed by the House and Senate. A House-Senate conference committee currently is endeavoring to reconcile, or compromise, the numerous differences.

Both the House and Senate versions of this bill contain provisions barring sex discrimination by educational

institutions receiving Federal support and provide for a cutoff of Federal funds as the ultimate penalty for violations. Both versions apply not only to discrimination in employment, but to admissions policies, with certain different exceptions. The House version would exempt undergraduate admissions policies of both public and private institutions of higher education. The Senate version would exempt undergraduate admissions only for private institutions and such public institutions that "traditionally and continually" have admitted only students of one sex. No exemption is contained in either version for admissions to graduate schools. In addition, both versions would amend the Equal Pay Act so it would apply to faculty and professional staffs.

Another bill (HR 7130), which has been approved by the House Education and Labor Committee, also would extend the provisions of the Equal Pay Act to executive, administrative, and professional employees. This bill, which amends the Fair Labor Standards Act, also would raise the Federal minimum wage to \$2 an hour.

Finally, the House Judiciary Committee has approved a bill (HR 12652) authorizing the Civil Rights Commission to study and investigate discrimination because of sex, as well as because of race. This new authority for the commission was recommended by President Nixon in his State of the Union message on January 20, 1972.

EXECUTIVE ORDER 11375

As noted above, a Presidential order barring sex discrimination in employment by government contractors has the widest application thus far to colleges and universities. This is Executive Order 11375, issued October 13, 1967, effective one year later. It amended a 1965 executive order (No. 11246) containing a similar ban against discrimination based on race, religion, color, or national origin. According to the Department of Health, Education, and Welfare, more than 80 percent of the nation's higher education institutions have contracts with the government and thus are subject to the order.

The key section of Executive Order 11375 reads as follows:

The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided

by the contracting officer setting forth the provisions of this nondiscrimination clause.

In June 1970 the Department of Labor issued guidelines to implement the order's sex discrimination ban. Among other things, the guidelines require contractors to "take affirmative action to recruit women to apply for those jobs where they have been previously excluded." Furthermore, they must demonstrate that they give equal access to both sexes in all training programs. Under the guidelines, covered contractors must maintain written personnel policies expressly indicating that there shall be no discrimination against employees on account of sex.

The guidelines specifically prohibit covered contractors from:

- Making any distinction based upon sex in employment opportunities, wages, hours, or other conditions of employment. In regard to employer contributions for insurance, pensions, and other similar fringe benefits, the guidelines state that the employer will not be considered in violation "if his contributions are the same for men and women or if the resulting benefits are equal."
- Making any distinction between married and unmarried persons of one sex unless the same distinctions are made between married and unmarried persons of the opposite sex.
- Advertising for workers in newspaper columns headed "Male" or "Female" unless sex is a bona fide occupational qualification.
- Denying employment to women with young children unless the same exclusionary policy exists for men; or terminating an employee of one sex in a particular job classification upon reaching a certain age unless the same rule is applicable to the opposite sex.
- Penalizing women because they require time away from work for childbearing. Childbearing must be considered justification for a leave of absence for a reasonable length of time, regardless of whether the employer has a leave policy or not.
- Maintaining seniority lines or lists based solely upon sex.
- Maintaining wage schedules related to or based on the sex of the employees, or discriminatorily restricting one sex to certain job classifications.
- Specifying any differences on the basis of sex in either mandatory or optional retirement age.
- Denying a female employee the right to any job she is qualified to perform in reliance upon a state "protective" law, such as one prohibiting women from working in certain types of occupations or from working at jobs requiring more than a certain number of hours.

The Department of Labor issued a further order in December 1971 requiring Federal contractors and subcontractors to develop goals and timetables for remedying the "underutilization" of women. They were given 120 days from the date (December 4) the order was published in the *Federal Register* to revise their affirmative action plans to include the new changes. The main change requires employers to analyze their work force to determine whether women are being underutilized and, where deficiencies are found, to develop goals and timetables for remedying the problem. The order states that contractors must make "good faith" efforts to correct any deficiencies in the utilization of women "at all levels and in all segments" of employment. Among the factors that contractors must consider in determining whether women are being underutilized are: the availability of women with requisite skills in the immediate area or an area in which the contractor can reasonably recruit, the availability of women seeking employment, and the availability of promotable female employees within the contractor's own institution.

Overall responsibility for enforcement of the orders rests with the Office of Federal Contract Compliance in the Department of Labor. It has assigned monitoring responsibility to 15 other Federal agencies that award the bulk of government contracts. HEW was designated

in 1967 as the compliance agency for all colleges and universities holding Federal contracts. To carry out this responsibility, HEW established a Contract Compliance Division in its Office for Civil Rights.

The prohibition against sex discrimination is enforced in the same manner as bans against discrimination by contractors because of race, color, religion, or national origin. Contracts with both public and private institutions include an equal opportunity clause, under which the institution agrees to take affirmative action to ensure that applicants and employees are treated "without regard to their race, color, religion, sex, or national origin." In addition, Labor Department regulations require private institutions with at least 50 employees and a contract of at least \$50,000 to develop, and have accepted, a written "affirmative action program." Regulations require periodic reviews by contract compliance officers to determine whether contractors are maintaining nondiscriminatory practices.

Noncompliance can lead to suspension or cancellation of a contract. Before that action is taken, however, Federal officials must try to obtain the contractor's compliance through mediation, conciliation, and persuasion.

HEW CONTRACT COMPLIANCE—MAJOR CONCERNS OF INSTITUTIONS

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IN JUNE 1970, the Department of Health, Education, and Welfare, under delegation of authority from the Department of Labor,¹ started actively enforcing its power of conducting contract compliance reviews under Executive Order 11246 as amended by E.O. 11375.

Under the executive order and the implementing regulations of the Department of Labor (41 CFR 60), every institution which holds a Federal contract or subcontract of \$10,000 or more must agree not to discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. Every private institution which employs more than 50 persons and which holds Federal contracts or subcontracts totalling \$50,000 must also have a written affirmative action program on file for

each of its establishments. Although public institutions are not required under 41 CFR 60-1-40 to have a written program on file, the obligation not to discriminate and to implement an affirmative action program does apply. HEW takes the position that a public institution can best carry out this obligation by conducting the same kinds of analyses required of nonpublic institutions by organizing into a written program its plans to overcome problems of past discrimination and underutilization.

Colleges and universities, at first individually and then—in January 1971—collectively, have tried to work with HEW and its regional offices to adjust whatever policies and practices on their campuses may have led to racial and sex discrimination. University and college administrators as well as campus and national women's groups have raised various issues that need resolution if discrimination is to be elimina-

1. The Department of Labor has overall policy responsibility for administering the executive order; HEW is the monitoring and investigating agency for institutions holding Federal contracts.

ted.² On some issues the women's groups side with HEW; on other issues they join institutions in criticizing HEW actions and policies. Despite nearly two years of effort, institutions still have little guidance in approaching and resolving the issues that relate to contract compliance.

It is now possible, however, to describe a typical contract compliance review in general terms of how it may currently be conducted. The material in the section immediately following is based on information gained during the past year; specifically, it draws on the experiences of the women's groups, of individual institutions, committee and staff work in the American Council on Education, and the Project on the Status and Education of Women of the Association of American Colleges.

The description of a contract compliance review leads, in turn, to the identification of nine major issues that, at the time of this writing, still remain unresolved. These are discussed in succeeding sections.

THE COMPLIANCE REVIEW

Typically, a complaint against an institution holding a contract with the Federal Government is filed with the Secretary of Health, Education, and Welfare, who refers it to one of the ten HEW regional offices. At first, HEW gave priority to individual complaints; now, however, priority has shifted to pattern complaints and to preaward compliance reviews (contracts involving more than \$1 million cannot be awarded without a prior investigation regarding nondiscrimination and adequacy of the affirmative action program).

The scheduling of a compliance investigative review depends on several factors, including the work load of the regional office. Each regional office issues its schedule of reviews quarterly, but in actuality a review is often delayed, sometimes with very little notice.

A letter goes to an institution notifying it that it is scheduled to be investigated by an HEW contract compliance review team, and requesting various kinds

of information to be assembled in advance of the review. Institutions are often surprised by the scheduling of the investigation and unaware of the procedures that will be followed. They may also be unprepared to provide the information requested because HEW has not yet specified what information it will require in all reviews and the type of information requested in past reviews has varied from campus to campus. At the present writing, HEW is in the process of drafting a memorandum to presidents of institutions to inform them of the procedures involved in a review and has begun to codify the kinds of information it will require in all campus investigations. It appears that institutions are likely to be asked for the following:

1. A listing of all employees (academic and non-academic, full time and part time, permanent and temporary, and students employed by both academic and nonacademic units). The inventory must list employees by race, sex, and ethnic origin, with job category, rate of pay, status (full time or part time, tenure, permanent or temporary, etc.), number of hours if working part time, date of hire, date of last promotion, and age.

2. A copy of any program (written affirmative action plan) which details actions being taken to guarantee equal employment, along with any written analysis or evaluation of the program.

3. A listing of all persons hired (except in labor service categories) in a recent period (usually six months or a year depending upon circumstances), identifying job or position classification, date of hire, starting pay rate, race or ethnic origin, and sex.

4. Copies of tests and other criteria used in making selections for employment, upgrading, and promotion; copies of any validation studies of the criteria.

5. Copies of manuals or other materials that describe matters affecting the employment or treatment of employees, such as faculty manuals, administrative practice manuals, personnel procedures, and operating guides.

In addition, investigators may request other information that they view as pertinent. Sometimes, when investigators have conferred with women or minority groups on the campus, these groups have suggested particular areas for investigation. For example, the HEW team may ask to see the personnel files of a specific department or other organizational unit, examining in greater detail the individual records of women and men applicants and employees. Department heads or supervisors, as well as some selected employees, may be interviewed. The review process may be completed in a scant three weeks or it may last for months.

When the investigation is completed, HEW, through

²Among these groups are women's civil rights groups such as Women's Equity Action League (WEAL) and the National Organization for Women (NOW); campus women's groups such as FOCUS at the University of Michigan, League of Academic Women (LAW) at the University of California, Berkeley; caucuses within the professional disciplines such as American Historical Association, Modern Language Association, American Political Science Association, etc.

Although this paper puts forth some of the views of women's groups, the reader should bear in mind that the executive order prohibits discrimination on the grounds of race, color, religion, and national origin as well as sex.

its regional office, gives the institution a "letter of findings" which details the results of the investigation and is usually presented to the institution's head during an "exit conference." The administrator may take exception to any or all of the findings provided he or she can supply supporting data. In any event, within 30 days after date of the letter of findings, the institution must make a written commitment to correct "deficiencies" noted in the findings and submit a written plan for doing so. The plan is then reviewed by the regional and Washington offices. The letter of findings is kept confidential by HEW, although the institution is free to make its contents public. In many cases, the delay between the issuance of the letter of findings and HEW's acceptance of an affirmative action plan has extended to over a year.

At any point during the compliance review, either before or after the letter of findings, HEW can delay awarding of a new contract, should it find that the institution is in noncompliance and that reasonable efforts to secure compliance by conciliation and conference are not working. Such delay is often for a specific number of days, within which the institution must move into compliance if it wants new contracts. The procedure for delay of a *new* contract is fairly informal; in contrast, the procedure for the termination or suspension of an *existing* contract is far more formal, involving a hearing before the sanction is imposed.

ISSUES IN COMPLIANCE REVIEW PROCESSES

For over a year, administrators throughout the country have voiced concern about various actions and policies of HEW. The following major issues have been raised by college and university officials with sufficient frequency to warrant detailed analysis:

1. Lack of uniform action by regional offices
2. Need for Federal guidelines
3. Access to personnel files
4. Due process of law in compliance reviews
5. Time requirements for response
6. Status of retroactive pay under Executive Order 11246, as amended
7. Publication of affirmative action programs
8. Criteria for measuring discrimination
9. Graduate admissions

1. Lack of Uniform Action by Regional Offices

The conduct of contract compliance reviews by the U.S. Department of Health, Education, and Welfare is a relatively new function for that agency. Probably as a result, actions taken by the various regional offices

have often been found to be inconsistent, and agreements acceptable in one region of the country may be unacceptable in other regions. Many regional HEW personnel seem to lack a clear understanding both of the existing guidelines and regulations and of the university community. Women's groups also claim that some HEW personnel are often unaware of the regulations they are to enforce. The Women's Equity Action League (WEAL), which has been particularly active in filing charges of sex discrimination, has called for a congressional investigation of HEW's handling of the sex discrimination complaints. It is suggested that if fairness to women and to institutions is to be achieved, regional HEW personnel must be informed of, and trained in, HEW procedures and their own responsibilities. It may also serve the best interest of all parties if HEW officials become better acquainted with the problems and processes of academic administration.

2. Need for Federal Guidelines

Although Executive Order 11246 has been in effect since 1965 and the sex discrimination provisions (Executive Order 11375) since 1968, HEW has not yet notified the academic community how it is to implement the provisions of the executive order and its regulations. Institutions and women's groups need to know what procedures are employed by HEW in enforcing the executive order, and also what information is required from the institutions and the form it should take—to cite only two of the several procedural matters that need resolution.

The Department of Labor has issued guidelines and policy statements concerning the executive order on nondiscrimination, but some issues that relate specifically to institutions of higher learning cannot readily be resolved by a reading of the regulations. In HEW, the lack of guidelines for institutions and the lack of consistent procedural regulations for HEW employees have caused major difficulties in seeking conciliation among HEW, institutions, and women's groups.

In summary, HEW guidelines for institutions of higher education are needed to serve as notice and guide as well as to ensure uniformity of action by HEW regional offices.

3. Access to Personnel Files

Institutions have recently raised the critical issue of whether HEW has the right to inspect all personnel files that it deems pertinent to a contract compliance review.

HEW maintains that its power to inspect university personnel records is derived from the "equal opportunity clause" of Executive Order No. 11246, as amended

(Pt. II, subpt. B, Sec. 202 [5]), which is embodied in all university contracts with the Federal Government. Regulations permit access to "books, records, and accounts pertinent to compliance" for "purposes of investigation to ascertain compliance with the equal opportunity clause of the contract..." (41 CFR Sec. 60-1.43). (Other antidiscrimination legislation also requires that employers make this information available.) Although the contractor agrees in writing to furnish required information and reports, and to comply with orders and regulations implementing the executive order, the extent of HEW's power to examine personnel files is questioned by institutions.

On the basis of these regulations, HEW has asked institutions for personnel records that relate to employment in order to evaluate whether or not discrimination exists. Institutions have been concerned about the possible disclosure of such information to unauthorized persons who do not have a legitimate interest in the content of personnel files.

Institutions contend that there are countervailing personal privileges and rights, including those of constitutional dimension, that compel a limitation of HEW's right of inquiry. A relationship of trust and confidence between faculty and administration, which is essential to the operation of a university, may be jeopardized and perhaps destroyed by improper disclosure of personnel records. Specifically, it is argued that in order to select and promote faculty, it is imperative to obtain candid appraisals, by individuals within and without the institution, of the qualification of candidates without inducing fear in the recommender that his or her confidence may be breached. In view of the institution's particular concern for the right of its members to speak freely, the maintenance of confidentiality of personnel files to some has become inextricably interwoven with the very maintenance of academic freedom. Moreover, administrators contend that examination of selected personnel files by HEW in the absence of a persuasive showing of cause constitutes a serious invasion of the right of privacy of the faculty member involved.

On the other hand, HEW employees are prohibited by the Freedom of Information Act from disclosing information contained in personnel files. The act specifically exempts from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency."

On this issue the women's groups agree with HEW. They point out that if employment records are not available to HEW, then both HEW and the institution

will be vulnerable to the charge of an incomplete and unfair investigation. The women ask how discrimination or the lack of discrimination can be evaluated if employment records are not available to HEW personnel. It is of interest to note here that the women's groups are not asking that personnel records be disclosed, only that they be made available to HEW personnel.

HEW has proposed but not yet issued a statement clarifying its policies concerning confidentiality of records.

4. *Due Process of Law in Compliance Reviews*

Numerous issues involving the implementation of due process of law with regard to compliance review have been raised by administrators.

a) *Notice of Impending Review*—HEW's practice is to have the appropriate regional office give written notice to the head of the institution three to four weeks before a compliance review is scheduled to begin. Institutions maintain that since punitive sanctions may be invoked, notification of the impending review should be given as far in advance as possible so that the institution may be adequately prepared for such review. It is suggested, for example, that as soon as HEW issues its quarterly schedule of reviews, all institutions listed should be notified immediately.

Women's groups and individual complainants have also expressed concern about HEW's notification procedures, claiming that they have rarely been notified of impending reviews and therefore have not been able to supply additional information to HEW.

b) *Notice of Complaint*—Currently, when complaints are filed with HEW, no notification is given to institutions until a compliance review is scheduled. In some instances the interval between filing of charges and the scheduling of a review has been a year or longer. Furthermore, some schools complain that HEW officials fail to spell out charges with sufficient specificity. An institution therefore lacks adequate data upon which to formulate or evaluate its program. If universities and colleges are to begin to study their policies and practices, it is critical that notification that charges have been filed be furnished in sufficient detail within a reasonable period of time, regardless of the date of the compliance review.

It would also be helpful if HEW would send copies of all pattern complaints to institutions promptly. Any procedures adopted would, of course, have to contain provisions safeguarding individual complainants from harassment.

c) *Right to a Hearing*—Federal regulations provide that "no order for cancellation... termination... or for debarment from further contracts or subcontracts...

shall be made without affording the prime contractor or subcontractor an opportunity for a hearing" (41 CFR Sec. 60-1.26 [b] [2]).

The problem area for institutions relates to the delay in awarding of *new* contracts. Any contract can be held up where a question exists about whether an institution is in compliance. As noted earlier, every contract in excess of \$1 million must have a preaward review to certify that the institution is in compliance with Executive Order 11246 (41 CFR Sec. 60-1.20 [d]). HEW maintains that the Government has the right to fix the terms and conditions of contracts awarded, a right which has been upheld by the courts. HEW claims that if a contract has not been officially awarded, the fact that it is "held up" does not constitute a deprivation of property without due process of law, which would require the granting of a hearing. Institutions argue that the foregoing constitutes a distinction without a difference and that inasmuch as the contract has been granted (though not completely cleared), any interference with their rights under the contract should be preceded by notice and a hearing.

d) *Right of Appeal*—HEW claims that the regulatory process as now constituted provides an opportunity for institutions to appeal decisions by a regional office to the national office. A "right of appeal" that is not set out in writing is not a right but a privilege that may be granted at administrative discretion. A written guarantee of appeal would help ensure that national guidelines are followed in a reasonably consistent manner. An established process of appeal would also eliminate confusion on the part of institutional authorities following exit conferences, by prescribing the next step for resolution of differences arising out of the findings made by the compliance review team. Women's groups have also complained about the lack of appeal procedures for complainants.

e) *Presumption of Innocence*—Administrators state that the HEW attitude seems to be that all colleges and universities are guilty of discrimination against women. Thus, institutions feel that they are having to sustain the burden of proof that they are not discriminating. HEW's position seems to be that an individual complaint does not have to set out a *prima facie* case, but must merely meet the burden of "going forward." Once the individual has produced sufficient evidence to support the legitimacy of his or her complaint, the burden of "going forward" shifts to the institution, not as a penalty, but because it alone possesses the information necessary to substantiate or refute the charges that have been brought. Both administrators and HEW regional officers have interpreted this shift in the burden of "going forward" as being equivalent to

a change in the Anglo-American system of jurisprudence by making an individual guilty until proven innocent.

HEW's Washington office contends that since the Government's right to set the terms of its own contracts was upheld in the courts, the institution, if it wants the contract, must meet the terms of the contract, i.e., nondiscrimination, and show that it has done so. There is no presumption of either innocence or guilt.

f) *Right to a Timely Decision*—In many cases, an institution has filed an affirmative action plan with HEW and has not been notified, sometimes for months, of its acceptability. During the waiting period it remains uncertain whether or not it is in compliance. According to HEW, an institution is not in compliance until approval of the plan is formally communicated. Any institution that has filed an affirmative action plan should be notified in a timely manner of the plan's current status so that it may rectify any deficiencies at the earliest possible time. Women's groups have been equally critical of such delays.

5. *Time Requirements for Response*

Institutions argue that some of the time limitations embodied in the regulations pertaining to the Executive Order 11246 are unreasonable. A particularly bothersome requirement is encountered in instances where the head of an institution, following an exit conference, takes exception to any one of the findings made by the compliance review team. Under the requirement, he or she may defer commitment on that specific finding provided detailed facts are forwarded to support the exception not later than 7 days after the conference and provided the institution makes an adequate commitment to correct all other deficiencies to which the contractor does not take exception.

Institutions have also had substantial difficulty in meeting the requirement which provides that within 30 days following the exit conference, they are to prepare a detailed program of specific actions to be taken within a stated period of time to remedy specific problems or deficiencies identified as a result of the compliance review.

HEW officials have indicated willingness to grant extensions if an institution cannot meet deadlines, and in practice it has done so. Institutions want HEW to declare a policy of granting extensions of time requirements when their strict implementation would constitute a severe burden to the institution. Women's groups have routinely complained when HEW has allowed any delays beyond the time limits set out in the regulations, charging that continual requests for extensions show bad faith by the institution.

6. *Status of Retroactive Pay under Executive Order 11246*

Several institutions and women's civil rights groups have researched the question of whether the executive order vests HEW with legal authority to compel the payment of retroactive pay to compensate individuals for losses resulting from discrimination in employment practices.

David Frohnmayer, legal assistant to President Robert D. Clark of the University of Oregon, made a detailed analysis of the retroactive pay requirement, and in a July 16 memorandum to the chief counsel for the Oregon State Board of Higher Education reported his conclusion "...that HEW has no legal authority to make such a demand for retroactive pay." Mr. Frohnmayer examined in detail the several points which HEW had been using in citing its legal authority to demand retroactive pay. In criticizing the HEW argument, Mr. Frohnmayer pointed out that "HEW concedes that the executive orders contain no provisions for such a back pay requirement, and Title VII cases on the point of back pay are *not* directly applicable to discrimination in violation of the Executive Orders."

HEW argues, however, that "numerous discrimination cases brought under *other provisions* of the law have held that employment discrimination *must* be remedied by the payment of lost wages...." Further, in two recent cases, the U.S. Court of Claims, citing another executive order dealing with discrimination, granted back pay to the plaintiff Federal employees. Counsel for several institutions see the two cases as clearly distinguishable from any similar situation arising at colleges and universities and believe them to constitute no precedent.

Attorneys for women's civil rights groups disagree, and support HEW on the legality of back pay, pointing out that the courts have long upheld back pay in cases of discrimination brought under various remedies such as the Civil Rights Act (Title VII),³ the Equal Pay Act, the Fourteenth Amendment, and other executive orders dealing with discrimination. Like the executive order that applies to universities and colleges, none of these remedies specifies back pay in its wording; yet this has not prevented the courts from upholding the applicability of back pay. Moreover, the women's groups add, the principle of redress of individual grievances is well established in law. Women's groups do not view back pay as a sanction but as compliance with the terms of Federal contracts previously entered into. They add that, should redress of inequities not

3. The recently enacted law amending Title VII, which extends coverage to colleges and universities, provides that back pay may be awarded for up to two years prior to the date the complaint is filed.

be retroactive, then institutions would be vulnerable to suits for violation of the terms of Federal contracts held during the time when the inequities occurred, and liable for repayment of contract money to the government. The civil rights attorneys claim that if back pay is not forthcoming, institutions may expect women to file a rash of large individual suits for damages incurred.

Institutions have noted that imposition of a back pay requirement may constitute an intolerable financial burden. They argue that retroactive pay should not be awarded because HEW has no authority to award such damages, and that since the promulgation of Executive Order 11246, as amended, institutions have had insufficient information upon which to establish an affirmative action program in order to have been in compliance.

Women's groups and HEW counter that the Federal contracts that institutions have signed have included the nondiscrimination provisions, and that the executive order itself specifically mentions discrimination in rates of pay as being prohibited.

7. *Publication of Affirmative Action Programs*

HEW would like to incorporate a provision in the national guidelines which would require an institution to make its affirmative action plan public within a reasonable time after the exit conference. The Department of Labor has ruled, however, that affirmative action plans are exempt from disclosure under the Freedom of Information Act (5 USC 552 [b] [4]) because they contain "commercial or financial information obtained from a person and [are] privileged or confidential." Therefore, the government need not release their plans, although the institutions are free to do so at their own discretion.

Affirmative action plans are general statements of policy and practices and do not contain any financial or commercial information, and an institution is in no way harmed if its plan falls into the hands of another college or university. Good personnel practices dictate that employee personnel policies having the broad nature of affirmative action plans should be made available to the people they are supposed to benefit, and many institutions have indeed followed this practice by making their affirmative action plans public. Women and minorities claim that they cannot fully evaluate any affirmative action plan for their benefit if they do not know what its contents are, nor can they judge the effectiveness of its implementation.

The Department of Labor takes the position that letters of findings and the institution's response are

confidential and unavailable to the public under the Freedom of Information Act as "investigatory files compiled for law enforcement purposes" (5 USC Sec. 553, 45 CFR Sec. 577).

The Labor Department authorizes the Office for Civil Rights in HEW to withhold letters of findings and replies of contractors while negotiations are in process. Some women's groups claim, however, that once negotiations are concluded, the Freedom of Information Act and the regulations implementing the executive order require public disclosure of the letter of findings, the institution's responses, and any resultant affirmative action program. Information such as salaries and personal information which the institution provides to HEW under an express or implied promise of confidentiality is, according to HEW, permanently immune from required disclosure.

8. *Criteria for Measuring Discrimination*

The Department of Labor published, on December 4, 1971, Revised Order No. 4, which details affirmative action requirements for contractors. The most important additions in the order are requirements that employers analyze their work force to determine whether women are being underutilized and, where deficiencies are found, develop goals and timetables for remedying the situation. Contractors and subcontractors continue to be required to make "good faith" efforts to correct deficiencies in the utilization of women "at all levels and in all segments" of their work force. As under the earlier version of the order, failure to correct the underutilization of women through development and implementation of an acceptable affirmative action program can lead to cancellation of existing contracts and subcontracts as well as debarment from future contracts and subcontracts.

The factors that contractors must consider to determine whether women are being underutilized in any job classification are based on general labor concepts and practices. The criteria are: amount of female unemployment in the labor area surrounding the facility; the female proportion of the total work force in the immediate labor area and an area in which the contractor can reasonably recruit; the availability of women seeking employment in the labor or recruitment area of the contractor; the availability of promotable and transferable female employees within the contractor's organization; the existence of training institutions capable of upgrading persons with the requisite skills, and the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to women.

Although the order does not define "immediate

labor area," the Department of Labor and HEW have interpreted the term as varying with the class of job: the immediate labor area for clerical help would probably be local; for academic and professional personnel, the labor market is national. Thus, the area of recruiting is different for the different levels and types of jobs. HEW will *not* set up criteria to be used for hiring or promotion, rightly stating that for it to do so would indeed be an infringement of academic freedom. Under executive order, HEW claims that each institution should specify its own job-related criteria for hiring and that these criteria, whatever they are, should apply equally to women and to men, to minorities and to nonminorities. Part of the difficulty that has arisen in the academic community is that these criteria have not always been specified or have varied with each person hired or promoted in a department; for example, lack of publication may be held as a reason individual X was not promoted although individual Y, who did not publish, was promoted, etc.

Institutions claim that the general criteria prepared for other labor markets pertaining to underutilization do not take cognizance of the special characteristics of the academic labor market—heavy dependence on the specific qualifications of individuals rather than on job specifications; the specialized training and education required for faculty positions; recruitment through institutions and processes markedly different from those characterizing industrial recruitment. Women's groups disagree, stating that the enumerated criteria are sufficiently general to apply to *all* hiring processes.

HEW regional offices have relied heavily on statistics to disclose the national proportion of women and minorities who have formal qualifications for academic positions. HEW and women's groups feel that such statistics indicate an estimate of the pool of qualified and available people; institutions strongly disagree and state that even more refined statistics would not provide information of markedly increased validity.

There remains the question of assessing the net result of the employer's actions. Have these actions resulted in a nondiscriminatory situation with respect to recruitment, hiring, promotions, transfers, and dismissals? How is good faith assessed? If institutions feel that statistics are not the answer, other answers must be found. A search for objective measures of good faith should supplement the search for statistical equity as the measure of efforts to attain equity in employment opportunities. HEW should detail how nondiscrimination is to be assessed in the academic setting, the possibilities and limitations of "statistical equity," and means, in addition to statistical measures, for assessing and delineating good faith efforts.

In considering the means of assessing nondiscrimination, it must be pointed out that neither the executive orders nor HEW has the intent of forcing the employer to hire unqualified persons, although HEW's policy has often been misinterpreted by institutions of higher education and HEW personnel alike.

Under Revised Order No. 4, numerical goals are a starting point in determining good faith compliance. Goals are numerical targets which a contractor tries to achieve. Their aim is affirmative in intent: to help increase the number of qualified minority people, including women, in the organization. They are flexible, and failure to meet a goal does not automatically indicate noncompliance *provided good faith efforts have been made to meet the goals*. If contractors meet their goals, it is reasonable to assume that they are in compliance, but the obligation to meet the goal is *not* absolute.

Goals differ from quotas in a number of ways. Quotas are fixed numerical limits that have the discriminatory intent of restricting the participation of a specified group in a particular activity.

The concept of numerical target goals as a legitimate requirement for Federal contractors was upheld by the Supreme Court in October 1971. Because much academic recruiting is national, universities and colleges will be considering the national pool of available women and minorities as each institution sets its own numerical goals. HEW should compile the data relating to the national pool and make it available to the academic community.

9. Graduate Admissions

The question has been raised whether an institution's graduate admissions are subject to review under the provisions of Executive Order 11246. Women leaders have maintained that the order grants jurisdiction over admissions to graduate study. They contend that admission to graduate school is akin to entry into the apprenticeship program of a labor union and that failure to gain admission effectively curtails one's chances of securing faculty employment at a later date.

Although HEW does not accept the apprenticeship

concept, it indicated it may assert jurisdiction where a relationship can be demonstrated between admission to graduate school and employment in the institution, such as in a teaching or research capacity. Institutions have contended that Executive Order 11246, as amended, does not grant HEW authority to review admission to graduate school and have for the most part declined to supply information regarding graduate admissions procedures. Policy in this area is still unsettled; HEW has not pressed this issue and is currently awaiting developments with regard to the sex discrimination provision in the higher education bill of 1971 (S. 659) in order to determine what future action may be required.

Federal involvement in ensuring nondiscrimination at institutions of higher education is likely to expand over the next several years. Women and other minority groups are examining academic policies and procedures for their impact and are pressing for change. Many institutions have begun to reevaluate their practices not only because of threatened government sanctions, but because of an increasing awareness that inequities exist and that these disparities should be corrected if the benefits of the educational system are to be available to all.

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